No. 82-1141

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

COMMON CAUSE, *et al.*,
Appellants,

v.

WILLIAM F. BOLGER, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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APPELLANTS' RESPONSE TO MOTIONS TO AFFIRM

ARCHIBALD COX *
ELLEN G. BLOCK
COMMON CAUSE
2030 M Street, N.W.
Washington, D.C. 20036
(202) 833-1200
Attorneys for Appellants

* *Counsel of Record*

Of Counsel:

PETER E. SCHEER
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

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On April 8, 1983, the Government and House Appellees filed separate motions to affirm the district court's dismissal of Common Cause's challenge to the constitutionality of the congressional franking statute. The motions raise several discreet issues which may bear on the Court's resolution of the jurisdictional question. Accordingly, Appellants file this brief memorandum in response.

THE APPEAL WAS TIMELY FILED

The appeal in this case was taken within sixty days of the judgment of the district court, in accordance with 28 U.S.C. § 2101(b). The district court had signed an

order on September 2, 1982 and "filed" it with the clerk on September 7, 1982. The clerk of the district court entered that order on September 8. Under Rule 58, Federal Rules of Civil Procedure, the district court judgment became effective at the time of its entry on September 8, 1982. Since the sixtieth day from that date fell on Sunday, November 7, Common Cause's November 8 notice of appeal was timely filed. *See* Sup. Ct. R. 29.1.

Burns v. *Richardson*, 384 U.S. 73 (1966) squarely supports this conclusion. Although the order there was announced more than sixty days prior to the notice of appeal, this Court upheld the timeliness of that appeal because the order was entered within the sixty day period. "Whether judged by the date of entry [citing Rule 58, Fed. R. Civ. P.] or by the fact that the order incorporated in the decision of February 17 [was reiterated in a subsequent order], the appeals from the decision announced February 17 were timely." 484 U.S. at 83 n.11. Plainly the Court treated the date upon which judgment was entered as the earliest possible time to start the running of the time for appeal.

No significance can be attributed to the fact that 28 U.S.C. § 2101(b) differs from other statutes and rules governing appeals and, indeed, from virtually all of its own statutory predecessors.[1] As Professor Moore points out, the statute's silence with respect to the entry of the judgment was inadvertent and does not reflect a congressional intent to prescribe a unique method for calculating

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[1] This statute, enacted as part of a revision and codification of the Judicial Code, Act of June 25, 1948, 62 Stat. 961, replaced four other provisions. *See* 28 U.S.C.A. § 2101, Reviser's Note: 1948 Act. Three of those predecessors used the entry of judgment as the point from which time to appeal runs. 28 U.S.C. § 47a (1940 ed.); 15 U.S.C. § 29 (1940 ed.); 49 U.S.C. § 45 (1940 ed.). There is no indication of any legislative intent to alter the operation of these provisions, despite the adoption of the language of the remaining predecessor, 28 U.S.C. § 47 (1940 ed.), with its bare reference to the date of the order appealed from.

the time for appeal. In any event, Professor Moore notes, the error is rendered "harmless" by Rule 58. 6A J. Moore, Federal Practice ¶ 58.05[2], p. 58-233 n.2 (1982).

THE QUESTION IS SUBSTANTIAL

1. The Appellees' submission that this case is not worthy of plenary review flows from their misperception of the nature of the case, a misperception epitomized by the Government's assertion (at p. 11 of its Motion) that this case has nothing to do with "mass mailings that 'have no relationship to official business.'" The Government quotes these words as if they came from our Jurisdictional Statement. In fact, they come from the findings made by the district court describing the legislation and the practices whose constitutionality is in question here:

> Several Senators and Representatives have targeted franked mailings in ways that frequently have no relationship to official business and which are closely connected to reelection plans and strategy.
>
> Opinion below at p. 13a of the Appendices to the Jurisdictional Statement; hereinafter C.C. App. —.

The Government also ignores other critically important district court findings of fact. Nowhere does it mention the court's general conclusion that the franking statute "confers a substantial [financial] advantage to incumbent Congressional candidates over their challengers." (C.C. App. 14a). Nor does its Motion mention the district court's findings regarding how this advantage is achieved —through the use of self-laudatory material, through the use of questionnaires designed to elicit politically useful information about constituents, through the use of targeted mass mailings "which are closely connected to reelection plans and strategy", and through timing franked mass mailings to accommodate the electoral cycle. (C.C. App. 13a-14a).

Finally, the Government disregards the district court's conclusions that these campaign uses of the frank have

been encouraged by, among others, the Chairman of the Appellee House Commission and sponsor of both the 1973 Franking Act and its 1981 amendments. (C.C. App. 12a), that these uses of the frank have been "specifically approved" by the House Commission and duly registered with the Secretary of the Senate (C.C. App. 13a-14a), and that Congress was mindful of the potential for these uses of the frank when it passed the Act. (C.C. App. 14a).

When these facts are taken into account, it is evident that the case involves the issues set forth in our Jurisdictional Statement and warrants plenary consideration by this Court.

2. After Common Cause filed its Jurisdictional Statement in early January, this Court decided *Perry Education Association* v. *Perry Local Educators' Association*, 51 U.S.L.W. 4165 (U.S. February 23, 1983). Appellees' reliance on that case is misplaced.

Perry involved a challenge by a teacher's union to a school board's policy of granting a rival union exclusive access to teachers through an in-house mail system; that right was granted to the favored union after it secured recognition under state law as the exclusive bargaining agent of the teachers. The Court examined the restriction under the line of cases dealing with access to public forums and upheld it against a First Amendment challenge.

For a variety of reasons, the *Perry* case has no bearing on the case presented for review here. First, the result in *Perry* followed from the Court's conclusion that the school mail system was not a public forum to which all speakers had to be given access in an even-handed manner. Access to a public forum is not at issue in this case, which involves the permissibility of a substantial government subsidy to the campaigns of incumbent

Senators and Representatives seeking reelection. (C.C. App. 14a).[2]

Second, central to the *Perry* decision was the fact that favored union's access to the mail system was limited to official business, and the Court explicitly declined to state how it would have ruled if the facts had proven otherwise. 51 U.S.L.W. at 4169-70 n.13. In this case, by contrast, there is "convincing" evidence of political use of the frank which the district court found to be "widespread," "substantial," and indeed *authorized* by the statute. (C.C. App. 12a-14a).

Finally, although it is obviously important, the interest in fair competition among rival labor representatives cannot be compared with the interest in fair competition among rival candidates for national political office. Congressional elections implicate fundamental rights at the heart of representative democracy; union elections do not. Accordingly, the Court's decision in *Perry* is not controlling in this case, and does not provide a basis for summary affirmance of the district court's judgment.

3. Far from relying upon the Establishment Clause of the First Amendment for this challenge to the franking statute, as the Government apparently believes (Motion at pp. 13-14), we allude to the operative test under that Clause merely by way of analogy. It is our point, set forth at p. 15 of the Jurisdictional Statement, that the constitutionality of the franking statue should be governed by the test of whether any uses of the frank permitted by it have the purpose or primary effect of promoting the election of the incumbent Congressman

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[2] Although extending the franking privilege to challengers in congressional elections would be one way to remedy the discriminatory effects of the current statute, *see* Jurisdictional Statement at p. 17, Common Cause has never suggested that this remedy is constitutionally compelled.

or Senator. We refer to the Establishment Clause and relevant cases for the sole purpose of demonstrating the practicability of such a test by reference to its use in another context.

4. The Government's attempt (Motion at p. 15) to present the issue before the Court as a choice between the present legislation and what it describes as "draconian" measures suggested by Common Cause is quite beside the point. The only question presented here is whether the present statute is constitutional. In our Jurisdictional Statement, we suggested alternative franking statutes that Congress might wish to adopt—*not that the Court should order.* Our sole purpose in doing this was to show that the task of separating the proper from the improper uses of the frank does not present a problem which is insoluble by Congress. *See* Jurisdictional Statement at p. 18.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted and the case set down for plenary consideration.

Respectfully submitted,

ARCHIBALD COX *
ELLEN G. BLOCK
COMMON CAUSE
2030 M Street, N.W.
Washington, D.C. 20036
(202) 833-1200
Attorneys for Appellants
* *Counsel of Record*

Of Counsel:
PETER E. SCHEER
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
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